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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

IN RE SUBPOENAS *DUCES TECUM*  
AND TO TESTIFY AT DEPOSITION  
TO COSWAY CO.

LIQWD, INC. and OLAPLEX LLC,

Plaintiffs,

vs.

L'ORÉAL USA, INC., L'ORÉAL USA  
PRODUCTS, INC., L'ORÉAL USA  
S/D, INC. and REDKEN 5<sup>TH</sup> AVENUE  
NYC, LLC,

Defendants.

CASE NO. 2:19-mc-00015

Underlying Litigation  
Civil Action No. 17-14-JFB-SRF  
United States District Court  
District of Delaware

Third-Party Discovery Cutoff:  
January 25, 2019  
Pretrial Conference: June 4, 2019  
Trial: July 29, 2019

**[DISCOVERY MATTER]**

**JOINT STIPULATION RE:  
DEFENDANTS' MOTION TO  
COMPEL NON-PARTY  
COSWAY CO. TO COMPLY  
WITH SUBPOENA *DUCES  
TECUM* AND TO TESTIFY AT  
DEPOSITION**

Date:  
Time:  
Dept.:  
Judge:

[Notice of Motion and Motion;  
Declaration of Katherine F. Murray;  
and [Proposed] Order Filed and  
Served Concurrently Herewith]

JOINT STIP. RE. DEFS.'  
MOTION TO COMPEL  
COMPLIANCE WITH SUBPOENA

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1 **I. L'ORÉAL USA'S PRELIMINARY STATEMENT**

2 L'Oréal USA, Inc., L'Oréal USA Products, Inc., L'Oréal USA S/D, Inc., and  
 3 Redken 5<sup>th</sup> Avenue NYC, LLC (together, "L'Oréal USA") respectfully request that  
 4 this Court compel third party Cosway Co.'s ("Cosway") compliance with a  
 5 Subpoena to Testify in a Civil Action with request to produce documents (the  
 6 "Subpoena") served on December 3, 2018, in connection with *Liqwd, Inc. v.*  
 7 *L'Oréal USA, Inc.*, Civil Action No. 17-14-JFB-SRF (the "Underlying Action"), a  
 8 case currently pending in the United States District Court for the District of  
 9 Delaware, which is set for trial on July 29, 2019.

10 The District of Delaware has already determined that the information sought  
 11 in the Subpoena is relevant. (*See* Declaration of Katherine F. Murray filed  
 12 concurrently herewith ("Murray Decl."), Ex. K at ¶ 6.) But Cosway, despite having  
 13 failed to timely object to the Subpoena, has not produced a single document  
 14 pursuant to the requests in the Subpoena, nor has it agreed to produce a Rule  
 15 30(b)(6) witness for any of the topics identified therein. As Cosway is located in  
 16 Carson, California, pursuant to Federal Rule of Civil Procedure ("Rule") 45,  
 17 L'Oréal USA respectfully requests that this Court compel Cosway's compliance  
 18 with the Subpoena. Fed. R. Civ. P. 45(d)(B)(2)(i). Alternatively, if this Court is so  
 19 inclined, L'Oréal USA requests that this matter be immediately transferred to the  
 20 District of Delaware for prompt resolution. Fed. R. Civ. P. 45(f); *infra* Section III.

21 The information L'Oréal USA seeks is plainly relevant to its defenses in the  
 22 Underlying Action. *Liqwd, Inc.* and *Olaplex LLC* (together, "Olaplex") initiated  
 23 the Underlying Action on January 5, 2017, and have asserted, among other things,  
 24 causes of action for infringement of U.S. Patent Nos. 9,498,419 ("the '419 patent")  
 25 and 9,668,954 ("the '954 patent") (together, the "Asserted Patents"). (Murray  
 26 Decl., Ex. K, ¶ 1.) The Asserted Patents are directed to methods of bleaching hair.  
 27 (*Id.*) Olaplex alleges that three L'Oréal USA products infringe certain claims of the  
 28 Asserted Patents, and seeks a permanent injunction enjoining their sale. At the

1 same time, Olaplex maintains that its own hair products that are also used during  
 2 bleaching (the “Olaplex Products”)<sup>1</sup> are not covered by the Asserted Patents.  
 3 L’Oréal USA served discovery on Olaplex seeking its basis for this assertion, as  
 4 this information bears directly on L’Oréal USA’s invalidity and non-infringement  
 5 defenses. But Olaplex has taken the position that it does not know the composition  
 6 of its products, as the they are made by third parties. One of those third parties is  
 7 Cosway. During recent depositions, Dean Christal, founder of Olaplex LLC,  
 8 testified that Cosway bottles the Olaplex Products, and that the formulas for the  
 9 Olaplex No. 2 and No. 3 products were created at Cosway. (Murray Decl., Ex. A at  
 10 14:21-15:17.) Similarly, Eric Pressly, one of the inventors of both the Olaplex  
 11 Products and the Asserted Patents, testified that the Olaplex No. 2 and No. 3  
 12 products are formulated at Cosway, and that Cosway is responsible for confirming  
 13 that the Olaplex Products meet specifications. (*Id.*, Ex. B at 65:4-12, 109:1-6. *See*  
 14 *also id.*, Ex. C at 12 (Olaplex stating it “is without knowledge of the specific  
 15 methods of mixing and bottling used by Cosway since launch to create the final  
 16 composition in [Olaplex No. 1]”).)

17 On December 3, 2018, L’Oréal USA served Cosway with a Subpoena  
 18 seeking information regarding the work it performs for Olaplex and the  
 19 composition of the Olaplex Products. (*Id.*, Ex. D.) The Subpoena set Cosway’s  
 20 deposition and document production deadline for December 20, 2018, at 10:00 a.m.

21 Cosway did not properly object or otherwise respond to the Subpoena. As a  
 22 result, on December 19, 2018, L’Oréal USA informed Olaplex’s counsel that  
 23 L’Oréal USA planned to proceed with Cosway’s deposition the following day.  
 24 (Murray Decl., E.) Then, a mere 22 minutes before it was scheduled to appear for  
 25 deposition, Cosway’s counsel emailed blanket, boilerplate objections to the

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26  
 27 <sup>1</sup> The Olaplex Products are: Olaplex Bond Multiplier No. 1 (“Olaplex No. 1”),  
 28 Olaplex Bond Perfector No. 2 (“Olaplex No. 2”), and Olaplex Hair Perfector No. 3  
 (“Olaplex No. 3”).

1 Subpoena. (Murray Decl., Ex. F.) Cosway did not produce a witness for the  
 2 deposition, nor did it produce any documents. On December 20, 2018, L'Oréal  
 3 USA recorded Cosway's non-appearance when it failed to produce a witness for  
 4 deposition. (*Id.*, Ex. G.)

5 L'Oréal USA has been, and will continue to be, prejudiced by Cosway's  
 6 failure to comply with the Subpoena. On January 4, 2019, L'Oréal USA moved to  
 7 modify the case schedule in the Underlying Action to extend the deadline to  
 8 complete third-party discovery, so that L'Oréal USA would have sufficient time to  
 9 incorporate evidence obtained by third parties in its expert reports, which were  
 10 originally due January 11, 2019. (Murray Decl., Ex. H.) In its request to the Court,  
 11 L'Oréal USA explained that, among other things, it required information from third  
 12 parties regarding the manufacture and composition of the Olaplex Products. (*Id.*,  
 13 Ex. I at 2.) Olaplex did not dispute the relevance of the discovery L'Oréal USA  
 14 sought from Olaplex's manufacturers, thereby conceding it. (*Id.*, Ex. J.)

15 On January 14, 2019, the District of Delaware agreed to a slight modification  
 16 of the schedule so that the parties could complete third-party discovery. In its  
 17 Order, the Court extended the third-party discovery deadline to January 25, 2019,  
 18 and indicated that the discovery sought by L'Oréal USA was "relevant to its  
 19 invalidity positions." (Murray Decl., Ex. K, ¶ 6.) The discovery is also relevant to  
 20 other claims and defenses in the Underlying Action, including the scope of the  
 21 Asserted Patents and infringement.

22 For the foregoing reasons, L'Oréal USA requests that this Court issue an  
 23 order compelling Cosway's compliance with the Subpoena prior to the January 25,  
 24 2019 deadline, or as soon as possible, and award L'Oréal USA all costs and fees  
 25 associated with bringing this Motion, especially given Cosway's utter disregard of  
 26 the Subpoena and the Federal Rules. Fed. R. Civ. P. 37(a)(5)(A). L'Oréal USA  
 27 has continued to make diligent attempts to meet and confer with Cosway regarding  
 28 these matters, but Cosway has refused to even respond. (*See, e.g., id.*, Ex. M.)

## 1 **II. COSWAY’S PRELIMINARY STATEMENT**

2 Cosway is not a party to the litigation pending in the U.S. District Court for  
 3 Delaware between L’Oreal and Olaplex. L’Oreal served a deposition subpoena  
 4 including sweeping document production requests on Cosway just *seventeen* days  
 5 prior to the noticed December 20, 2018 deposition date and in the midst of the  
 6 holiday season. L’Oreal did not consult Cosway, or its counsel regarding their  
 7 availability to attend such a deposition, or Cosway’s ability to comply with  
 8 L’Oreal’s extensive document production requests on such short notice.

9 Cosway has obtained a copy of the U.S. District Court for the District of  
 10 Delaware’s Order regarding L’Oreal’s discovery activities and request for an  
 11 extension. [Case 1:17-cv-00014-JFB-SRF Doc. 610] That Order reveals that  
 12 L’Oreal scheduled Cosway’s deposition and substantial document production to  
 13 occur just one day prior to the court-ordered cut-off for third party discovery,  
 14 December 21, 2018.

15 L’Oreal attempted to force the consequences of its own delays in completing  
 16 third party discovery on Cosway in the form of an absurdly short deadline to  
 17 comply with onerous document requests and an utter disregard for the expense and  
 18 disruption that L’Oreal’s eleventh-hour scramble to complete discovery would  
 19 impose on Cosway. Moreover, the District Court’s scheduling order in the  
 20 underlying action further reveals that third-party discovery closed on January 25,  
 21 2019. Although L’Oreal is no longer authorized to conduct third party discovery in  
 22 the underlying action, it seeks to burden Cosway and this Court with this dispute.

## 23 **III. L’ORÉAL USA’S REQUEST TO TRANSFER**

24 If this Court is not inclined to rule on L’Oréal USA’s Motion, then L’Oréal  
 25 USA requests that this Court transfer this matter to the District of Delaware. Under  
 26 Rule 45(f), the Court “may transfer a motion under this rule to the issuing court . . .  
 27 if the court finds exceptional circumstances.” When, as here, “the issuing court has  
 28 already ruled on issues presented by a subpoena-related motion, exceptional

circumstances exist[,]” especially given the schedule in the Underlying Action. *Moon Mountain Farms, LLC v. Rural Cmty. Ins. Co.*, 301 F.R.D. 426, 429 (N.D. Cal. 2014). (See Murray Decl., Ex. K, ¶ 6 (holding that the information sought by L’Oréal USA is “relevant”).) See also *3B Med., Inc. v. Resmed Corp.*, No. 16-CV-2050-AJB-JMA, 2016 WL 6818953, at \*3 (S.D. Cal. Oct. 11, 2016) (holding that a fast-approaching discovery deadline, coupled with the fact that the issuing court “has already ruled on discovery-related motions in this matter, including motions of third-party subpoenas[,]” create exceptional circumstances warranting a transfer); Fed. R. Civ. P. 45(f) advisory committee’s note (transfer is warranted “in order to avoid disrupting the issuing court’s management of the underlying litigation . . .”).

#### IV. COSWAY’S OBJECTION TO TO TRANSFER

The third-party discovery cut-off is not fast approaching in the underlying action; *it has passed*. Accordingly, the authorities cited by L’Oreal do not support transfer here where L’Oreal is solely responsible for its own failure to pursue third-party discovery in sufficient time to avail itself of this District’s discovery dispute resolution procedures prior before the discovery cut-off.

Further, in addition to its eleventh-hour attempt to burden Cosway with an onerous deposition subpoena for the production of documents and for testimony, L’Oreal now seeks to burden Cosway with responding in a Court more than two thousand miles from its offices in Carson California at a time when L’Oreal’s right to conduct third-party discovery has already expired by operation of that Court’s scheduling order. Cosway objects to such a transfer.

#### V. L’ORÉAL USA’S POSITION AS TO THE ISSUES IN DISPUTE

As a threshold matter, L’Oréal USA is entitled to all of the information it seeks, as Cosway never properly objected to the Subpoena, and thus waived all objections thereto. See *McCoy v. Sw. Airlines Co.*, 211 F.R.D. 381, 385 (C.D. Cal. 2002) (“Failure to serve timely objections waives all grounds for objection, including privilege . . .”) (citing *In re DG Acquisition Corp.*, 151 F.3d 75, 81 (2d

1 Cir.1998)); *Creative Gifts, Inc. v. UFO*, 183 F.R.D. 568, 570 (D.N.M. 1998) (same)  
 2 (citing *Wang v. Hsu*, 919 F.2d 130 (10th Cir. 1990)); *Poturich v. Allstate Ins. Co.*,  
 3 No. EDCV150081GWKKX, 2015 WL 12766048, at \*2 (C.D. Cal. Aug. 11, 2015)  
 4 (ordering non-party, who failed to timely object to defendant's subpoena, to  
 5 produce all documents responsive thereto "without objections"); *A.M.J. v. Cty. of*  
 6 *Los Angeles*, No. EDCV151346-VAP-SPX, 2016 WL 11185268, at \*2 (C.D. Cal.  
 7 Apr. 12, 2016) (granting motion to compel and holding that, "as County failed to  
 8 timely serve objection to plaintiffs' subpoena, County has waived all grounds for  
 9 objection, including privilege").

10 Cosway emailed objections to the Subpoena more than 14 days after it was  
 11 served with the same. (Murray Decl., Exs. D, F.) This response was both untimely,  
 12 *see* Fed. R. Civ. P. 42(d)(2)(B) (objections must be served 14 days after service of  
 13 subpoena) and improper, as L'Oréal USA had not previously agreed to service by  
 14 email. *See* Fed. R. Civ. P. 5(b)(2)(E) (requiring that parties consent to service by  
 15 email).

16 But even if Cosway had properly objected to the Subpoena, L'Oréal USA  
 17 still would be entitled to the documents and testimony sought therein. The court  
 18 overseeing the Underlying Action confirmed as much. (*See* Murray Decl., Ex. K, ¶  
 19 6.) As explained further below, the information L'Oréal USA seeks bears directly  
 20 on, at least, the invalidity and non-infringement defenses it has asserted in the  
 21 Underlying Action, and, as such, should be produced. *See* Fed. R. Civ. P. 26  
 22 ("Parties may obtain discovery regarding any nonprivileged matter that is relevant  
 23 to any party's claim or defense . . ."); *Thomas-Byass v. Michael Kors Stores*  
 24 *(California), Inc.*, No. CV1500369-JGB-KKX, 2015 WL 5568609, at \*2 (C.D. Cal.  
 25 Sept. 22, 2015) ("Relevancy should be 'construed liberally and with common sense  
 26 and discovery should be allowed unless the information sought has no conceivable  
 27 bearing on the case.'") (quoting *Soto v. City of Concord*, 162 F.R.D. 603, 610 (N.D.  
 28 Cal. 1995)).

Moreover, as noted above, L'Oréal USA reached out to Cosway multiple times to meet and confer regarding the Subpoena, in an effort to resolve these matters without having to resort to motion practice, but Cosway never responded. (See Murray Decl., Ex. M.) For this reason and for the reasons explained below, this Court should compel Cosway's compliance with the Subpoena.

**A. Cosway Should Produce Documents and Provide Testimony Regarding the Composition of the Olaplex Products and Its Communications Regarding the Same.**

Cosway should be compelled to comply with Topic No. 1 and Request for Production No. 1, both of which seek information pertaining to its communications with Olaplex and third parties regarding the Olaplex Products:

TOPIC NO. 1:

Your Communications with Plaintiffs or any other Person, including Gelest, Inc., Concerning the Olaplex Products.

OBJECTIONS TO TOPIC NO. 1:

Cosway objects to this Topic to the extent that it seeks information that is not relevant to any party's claim or defense and not proportional to the needs of the case. Cosway further objects to this Topic to the extent that it seeks Cosway's information protected by the attorney-client privilege and/or attorney work product doctrine. Cosway further objects to this Topic to the extent that it seeks information pertaining to individuals, the disclosure of which would constitute an unwarranted invasion of the affected individuals' constitutional, statutory and/or common law rights to personal privacy and confidentiality. Cosway further objects to this Topic on the grounds that it seeks Cosway's confidential commercial, financial, and/or proprietary business information. Cosway objects to this Topic as overbroad as to scope and time, unduly burdensome, irrelevant, and not proportional to the needs of this case including through its call for all "Communications with Plaintiffs or any other person...concerning Olaplex Products," which is completely unfettered from time or scope and could require someone to speak to hundreds of thousands of communications over many years.

REQUEST FOR PRODUCTION NO. 1:

All Communications with Plaintiffs or any other Person, including Gelest, Inc., Concerning the Olaplex Products.

RESPONSE TO REQUEST FOR PRODUCTION NO. 1:

Cosway objects to this Request to the extent that it seeks information that is not relevant to any party's claim or defense and not proportional to the needs of the case. Cosway further objects to this Request to the extent that it seeks Cosway's information protected by the attorney-client privilege and/or attorney work product doctrine. Cosway further objects to this Request to the extent that it seeks information pertaining to individuals, the disclosure of which would constitute an unwarranted invasion of the affected individuals' constitutional, statutory and/or common law rights to personal privacy and confidentiality. Cosway further objects to this Request on the grounds that it seeks Cosway's confidential commercial, financial, and/or proprietary business information. Cosway objects to this Request as overbroad as to scope and time, unduly burdensome, irrelevant, and not proportional to the needs of this case including through its call for all "Communications with Plaintiffs or any other person...Concerning the Olaplex Products," which is completely unfettered from time or scope.

Cosway's responses to both requests will bear on L'Oréal USA's defenses. For instance, Cosway's communications with Gelest, Inc., a manufacturer of some of the ingredients of the Olaplex products, would elucidate the creation and composition of the Olaplex Products. (*See* Murray Decl., Ex. B at 62:25-63:3; (co-inventor Eric Pressly testifying that Gelest makes the active ingredients that are used in the Olaplex Products).) The ingredients and composition of the Olaplex Products, whether they have changed over time, how they have changed over time, and the persons privy to this information, are all relevant to issues of invalidity, including prior use. *See, e.g., Charles Jacquin Et Cie Inc. v. Destileria Serralles, Inc., Crown Mktg. Int'l, Howrene Wine & Spirit Inc.*, No. CIV. 88-3040, 1989 WL 63184, at \*3 (E.D. Pa. June 7, 1989) ("Evidence of prior use by a third party might be directly relevant to specific defenses."). They are also relevant to the scope of the Asserted Patents and infringement.

Cosway's boilerplate objections to either request, which should be ignored, as they were not timely or properly served on L'Oréal USA, are, in any event, baseless. The information sought by these requests is plainly relevant. Moreover,

1 Cosway's overly broad objection is untenable, as these requests do not seek  
 2 privileged information, but only information related to the Olaplex Products, which  
 3 Olaplex has already testified would be in Cosway's possession. (*See* Murray Decl.,  
 4 Ex. A at 14:21-15:17, Ex. B at 65:4-12, 109:1-6, Ex. C at 12.) To the extent  
 5 Cosway objects on confidentiality grounds, these concerns are mooted by the  
 6 Stipulated Protective Order governing the Underlying Action. (Underlying Action,  
 7 D.I. 54, ¶¶ 2, 9 ("Protected Material disclosed by . . . a third party . . . pursuant to  
 8 discovery in this action, . . . shall be used solely for purposes of this action and not  
 9 for any other purpose . . .").)

10 Cosway also should be compelled to produce documents and provide  
 11 testimony responsive to Topic No. 2 and Request for Production No. 2, which seek  
 12 information "[c]oncerning any mixing, creation, manufacture, packaging, and use  
 13 of the Olaplex Products by [Cosway] or anyone on [its] behalf, and the ingredients,  
 14 composition, chemicals, and formulas that [it] ha[s] created, received, or used  
 15 Concerning the Olaplex Products," and Topic No. 5 and Request for Production  
 16 No. 5, which seek the identity of persons to who Cosway distributed the Olaplex  
 17 Products. As explained above, this information is, for example, plainly relevant to  
 18 L'Oréal USA's invalidity defense, as it bears on prior use of the Olaplex Products.  
 19 Cosway's untimely and boilerplate objections to these requests should be overruled:

20 TOPIC NO. 2:

21 The Olaplex Products, including any mixing, creation,  
 22 manufacture, packaging, and use of the Olaplex Products  
 23 by You or anyone on Your behalf, and the ingredients,  
 24 composition, chemicals, and formulations Concerning the  
 Olaplex Products, including formulas that You have  
 created, received, or used Concerning the Olaplex  
 Products.

25 OBJECTIONS TO TOPIC NO. 2:

26 Cosway objects to this Topic to the extent that it seeks  
 27 information that is not relevant to any party's claim or  
 defense and not proportional to the needs of the case.  
 28 Cosway further objects to this Topic to the extent that it  
 seeks information protected by the attorney-client

1 privilege and/or attorney work product doctrine. Cosway  
 2 further objects to this Topic to the extent that it seeks  
 3 information pertaining to individuals, the disclosure of  
 4 which would constitute an unwarranted invasion of the  
 5 affected individuals' constitutional, statutory and/or  
 6 common law rights to personal privacy and  
 7 confidentiality. Cosway further objects to this Topic on  
 8 the grounds that it seeks Cosway's confidential  
 9 commercial, financial, and/or proprietary business  
 10 information. Cosway objects to this Topic as overbroad as  
 11 to scope and time, unduly burdensome, irrelevant, and not  
 12 proportional to the needs of this.

#### 13 REQUEST FOR PRODUCTION NO. 2:

14 All Documents, Communications, and Things Concerning  
 15 the Olaplex Products, including all Documents,  
 16 Communications, and Things Concerning any mixing,  
 17 creation, manufacture, packaging, and use of the Olaplex  
 18 Products by You or anyone on Your behalf, and the  
 19 ingredients, composition, chemicals, and formulations  
 20 Concerning the Olaplex Products, including formulas that  
 21 You have created, received, or used Concerning the  
 22 Olaplex Products.

#### 23 RESPONSE TO REQUEST FOR PRODUCTION NO. 2:

24 Cosway objects to this Request to the extent that it seeks  
 25 information that is not relevant to any party's claim or  
 26 defense and not proportional to the needs of the case.  
 27 Cosway further objects to this Request to the extent that it  
 28 seeks Cosway's information protected by the attorney-  
 client privilege and/or attorney work product doctrine.  
 Cosway further objects to this Request to the extent that it  
 seeks information pertaining to individuals, the disclosure  
 of which would constitute an unwarranted invasion of the  
 affected individuals' constitutional, statutory and/or  
 common law rights to personal privacy and  
 confidentiality. Cosway further objects to this Request on  
 the grounds that it seeks Cosway's confidential  
 commercial, financial, and/or proprietary business  
 information. Cosway objects to this Request as overbroad  
 as to scope and time, unduly burdensome, irrelevant, and  
 not proportional to the needs of this case including  
 through its call for all "Documents, Communications, and  
 Things Concerning the Olaplex Products," which is  
 completely unfettered from time or scope and will  
 unreasonably burden non-party Cosway Company Inc.

#### 29 TOPIC NO. 5:

30 Shipping. Delivery, or other distribution of any Olaplex  
 31 Products by You, or on Your behalf, to any Person(s),  
 32 including the identity of such Person(s), the reasons for  
 such shipping, delivery, or other distribution, and any

1 invoices provided to, and payments received from, any  
 2 Person(s) Concerning such shipping, delivery, or other  
 distribution of such Olaplex Products.

3 OBJECTIONS TO TOPIC NO. 5:

4 Cosway objects to this Topic to the extent that it seeks  
 5 information that is not relevant to any party's claim or  
 defense and not proportional to the needs of the case.  
 6 Cosway further objects to this Topic to the extent that it  
 seeks information protected by the attorney-client  
 7 privilege and/or attorney work product doctrine. Cosway  
 further objects to this Topic to the extent that it seeks  
 8 information pertaining to individuals, the disclosure of  
 which would constitute an unwarranted invasion of the  
 affected individuals' constitutional, statutory and/or  
 9 common law rights to personal privacy and  
 confidentiality. Cosway further objects to this Topic on  
 10 the grounds that it seeks Cosway's confidential  
 commercial, financial, and/or proprietary business  
 11 information. Cosway objects to this Topic as overbroad as  
 to scope and time, unduly burdensome, irrelevant, and not  
 12 proportional to the needs of this case.

13 REQUEST FOR PRODUCTION NO. 5:

14 All Documents, Communications, and Things Concerning  
 any shipping, delivery, or other distribution of any  
 15 Olaplex Products by You, or on Your behalf, to any  
 Person(s) including Documents, Communications, and  
 16 Things that identify such Person(s), and any invoices  
 provided to, and payments received from, any Person(s)  
 17 Concerning such shipping, delivery, or other distribution  
 of such Olaplex Products.

18 RESPONSE TO REQUEST FOR PRODUCTION NO. 5:

19 Cosway objects to this Request to the extent that it seeks  
 20 information that is not relevant to any party's claim or  
 defense and not proportional to the needs of the case.  
 21 Cosway further objects to this Request to the extent that it  
 seeks Cosway's information protected by the attorney-  
 22 client privilege and/or attorney work product doctrine.  
 Cosway further objects to this Request to the extent that it  
 23 seeks information pertaining to individuals, the disclosure  
 of which would constitute an unwarranted invasion of the  
 affected individuals' constitutional, statutory and/or  
 24 common law rights to personal privacy and  
 confidentiality. Cosway further objects to this Request on  
 25 the grounds that it seeks Cosway's confidential  
 commercial, financial, and/or proprietary business  
 26 information. Cosway objects to this Request as overbroad  
 as to scope and time, unduly burdensome, irrelevant, and  
 27 not proportional to the needs of this case.  
 28

**B. Cosway Should Produce Documents and Testimony Regarding Invoices and Payments Relating to the Olaplex Products.**

Cosway should be compelled to comply with Topic Nos. 3 and 4, and Request for Production Nos. 3 and 4, which seek information relating to invoices and payments regarding the Olaplex Products:

TOPIC NO. 3:

Invoices that You have issued to Plaintiffs, and payments that You have received from Plaintiffs' behalf, Concerning the Olaplex Products.

OBJECTIONS TO TOPIC NO. 3:

Cosway objects to this Topic to the extent that it seeks information that is not relevant to any party's claim or defense and not proportional to the needs of the case. Cosway further objects to this Topic to the extent that it seeks information protected by the attorney-client privilege and/or attorney work product doctrine. Cosway further objects to this Topic to the extent that it seeks information pertaining to individuals, the disclosure of which would constitute an unwarranted invasion of the affected individuals' constitutional, statutory and/or common law rights to personal privacy and confidentiality. Cosway further objects to this Topic on the grounds that it seeks Cosway's confidential commercial, financial, and/or proprietary business information. Cosway objects to this Topic as overbroad as to scope and time, unduly burdensome, irrelevant, and not proportional to the needs of this case including through its call for all invoices and payments concerning Olaplex, which is completely unfettered from time.

TOPIC NO. 4:

Invoices that You have issued to any Person other than Plaintiffs, and payments that You have received from such Person(s), Concerning the Olaplex Products.

OBJECTIONS TO TOPIC NO. 4:

Cosway objects to this Topic to the extent that it seeks information that is not relevant to any party's claim or defense and not proportional to the needs of the case. Cosway further objects to this Topic to the extent that it seeks information protected by the attorney-client privilege and/or attorney work product doctrine. Cosway further objects to this Topic to the extent that it seeks information pertaining to individuals, the disclosure of which would constitute an unwarranted invasion of the affected individuals' constitutional, statutory and/or

1 common law rights to personal privacy and  
 2 confidentiality. Cosway further objects to this Topic on  
 3 the grounds that it seeks Cosway's confidential  
 4 commercial, financial, and/or proprietary business  
 information. Cosway objects to this Topic as overbroad as  
 to scope and time, unduly burdensome, irrelevant, and not  
 proportional to the needs of this case.

5 REQUEST FOR PRODUCTION NO. 3:

6 All invoices that You have issued to Plaintiffs, and  
 7 payments that You have received from Plaintiffs or  
 8 anyone on Plaintiffs' behalf, Concerning the Olaplex  
 Products.

9 RESPONSE TO REQUEST FOR PRODUCTION NO. 3:

10 Cosway objects to this Request to the extent that it seeks  
 information that is not relevant to any party's claim or  
 defense and not proportional to the needs of the case.  
 11 Cosway further objects to this Request to the extent that it  
 seeks Cosway's information protected by the attorney-  
 12 client privilege and/or attorney work product doctrine.  
 Cosway further objects to this Request to the extent that it  
 13 seeks information pertaining to individuals, the disclosure  
 of which would constitute an unwarranted invasion of the  
 14 affected individuals' constitutional, statutory and/or  
 common law rights to personal privacy and  
 15 confidentiality. Cosway further objects to this Request on  
 the grounds that it seeks Cosway's confidential  
 16 commercial, financial, and/or proprietary business  
 information. Cosway objects to this Request as overbroad  
 17 as to scope and time, unduly burdensome, irrelevant, and  
 not proportional to the needs of this case.

18 REQUEST FOR PRODUCTION NO. 4:

19 All invoices that You have issued to any Person other  
 20 than Plaintiffs, and payments that You have received from  
 such Person(s), Concerning the Olaplex Products.

21 RESPONSE TO REQUEST FOR PRODUCTION NO. 4:

22 Cosway objects to this Request to the extent that it seeks  
 23 information that is not relevant to any party's claim or  
 defense and not proportional to the needs of the case.  
 24 Cosway further objects to this Request to the extent that it  
 seeks Cosway's information protected by the attorney-  
 25 client privilege and/or attorney work product doctrine.  
 Cosway further objects to this Request to the extent that it  
 26 seeks information pertaining to individuals, the disclosure  
 of which would constitute an unwarranted invasion of the  
 27 affected individuals' constitutional, statutory and/or  
 common law rights to personal privacy and  
 28 confidentiality. Cosway further objects to this Request on

the grounds that it seeks Cosway's confidential commercial, financial, and/or proprietary business information. Cosway objects to this Request as overbroad as to scope and time, unduly burdensome, irrelevant, and not proportional to the needs of this case.

The invoices at issue would identify the ingredients of the Olaplex Products from the first instance that Cosway began working with Olaplex. But, beyond that, they would also illuminate the nature of work Cosway performed for Olaplex. This would help explain the extent of Cosway's involvement with respect to the formulation of the Olaplex Products. Again, all of this information is relevant to invalidity, including prior use, and scope of the Asserted Patents and infringement.

Cosway asserts inapplicable boilerplate objections to these requests, which should be overruled. *See Brill v. Napolitano*, No. CV 09-0421-PSG(RCX), 2010 WL 11512400, at \*2 (C.D. Cal. May 12, 2010) (overruling "unexplained and unsupported boilerplate objections" to discovery requests as "improper"); *A. Farber & Partners, Inc. v. Garber*, 234 F.R.D. 186, 188 (C.D. Cal. 2006) ("[G]eneral or boilerplate objections such as 'overly burdensome and harassing' are improper—especially when a party fails to submit any evidentiary declarations supporting such objections."). The information sought is plainly relevant, and the documents and testimony requested are narrowly tailored. Moreover, Cosway's confidentiality concerns are mooted by the Stipulated Protective Order governing the Underlying Action.

## **VI. COSWAY'S POSITION AS TO THE ISSUES IN DISPUTE**

### **A. The Court May Consider Cosway's Objections**

Courts may excuse untimely objections in certain circumstances. This includes circumstances where the subpoena is overbroad on its face, imposes a significant burden on a non-party witness, or sets a return date that does not allow for sufficient time for compliance. (*See Semtek Intern., Inc. v. Mercuriy Ltd.*, No. 3607, 1996 WL 238538, at \*2 (N.D.N.Y. May 1, 1996).)

1 Here, L'Oreal set a deposition subpoena including a sweeping document  
 2 production request on seventeen days' notice, without consulting Cosway or its  
 3 counsel regarding their availability on the noticed date, and with utter disregard for  
 4 the burden the subpoena would impose on Cosway. Cosway submits that the Court  
 5 will be well within its authority to consider Cosway's objections despite the three-  
 6 day delay in timely serving the objections which L'Oreal concedes it received.

7 **B. L'Oreal Has Not Demonstrated That the Requested Documents**  
 8 **Are Sufficiently Relevant to Justify the Burden to Cosway.**

9 L'Oreal's Document Request No. 3 demands that Cosway produce all of the  
 10 invoices it has issued to Olaplex and payments received from Olaplex. Document  
 11 Request No. 4 seeks production of invoices Cosway issued to others and payments  
 12 received from such persons. L'Oreal asserts that "[t]he invoices at issue would  
 13 identify the ingredients of the Olaplex Products from the first instance that Cosway  
 14 began working with Olaplex. But L'Oreal offers no evidence or explanation for  
 15 this bare assertion.

16 **C. The Court Should Shift the Cost of Compliance to L'Oreal.**

17 In those circumstances where the court may quash or modify a subpoena, the  
 18 court can instead shift the cost of compliance to the issuing party (FRCP  
 19 45(d)(3)(C)). In deciding whether to shift the cost of compliance to the party  
 20 seeking discovery, courts typically consider the non-party's interest in the outcome  
 21 of the case, the non-party's ability to bear the costs (as compared to the requesting  
 22 party's) and whether the litigation is of public importance. (See *Miller v. Allstate*  
 23 *Fire & Cas. Ins. Co.*, No. 07-cv-0260, 2009 WL 700142, at, at \*5.)

24 Although Cosway has not moved to quash the subpoena in issue here, it  
 25 respectfully requests that the Court shift the cost of compliance with the subpoena  
 26 to L'Oreal. Cosway is a has no stake in this litigation and is a California based  
 27 manufacturer. L'Oreal, on the other hand, is a subsidiary of L'Oreal, S.A., a  
 28 worldwide enterprise with resources that dwarf those of Cosway. Under these

1 circumstances, and if the Court compels Cosway's compliance with the disputed  
2 subpoena, Cosway respectfully submits that L'Oreal should bear the costs of  
3 Cosway's expense of compliance in view L'Oreal's vast resources in comparison  
4 with Cosway, and Cosway's status as a bystander to this dispute.

5  
6 DATED: January \_\_, 2019

PAUL HASTINGS LLP

7 By: \_\_\_\_\_ /s/  
8 Katherine F. Murray

9 Attorneys for Defendants  
10 L'ORÉAL USA, INC., L'ORÉAL USA  
11 PRODUCTS, INC., L'ORÉAL USA  
12 S/D, INC. and REDKEN 5<sup>TH</sup> AVENUE  
NYC, LLC

13 DATED: January 29, 2019

KRIEGER & KRIEGER, A LAW  
CORPORATION

14  
15 By: \_\_\_\_\_  
16 Lawrence R. Cagney

17 Attorneys for Cosway Co.